

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

KENNETH COLVIN, JR.,

Plaintiff,

v.

Case No. 2:09-cv-96
HON. ROBERT HOLMES BELL

MICHAEL MARTIN,

Defendant.

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REPORT AND RECOMMENDATION

Plaintiff Kenneth Colvin, Jr., filed a motion for default and default judgment against defendant under Fed. R. Civ. P. 37, because defendant has failed to comply with court orders and committed a fraud upon the court. Plaintiff claims that defendant created a document, “MDOC Prisoner Religious Meal Worksheet,” for purposes of litigation and provided that document as an answer to discovery, when it was clear that defendant never relied upon that document in making the decision to refuse to allow plaintiff to participate in a Kosher meal diet. Plaintiff states that defendant has presented similar but not identical worksheets. Plaintiff claims that defendant is not disclosing the actual date that the worksheet was created and is being dishonest about the date the worksheet was created. Defendant has asserted that he destroyed some documents that were originally used to make the determination regarding whether plaintiff would be provided Kosher meals. Plaintiff claims that “[d]efendant has absolutely failed to present any reliable evidence that will substantiate [d]efendant’s claims that the MDOC Prisoner Religious Meal Worksheet

format/program was actually created on August 25, 2008, and he created the [p]laintiff's worksheet on that same date."

This court has authority to impose sanctions against a party for failing to participate in discovery, including granting a default judgment against the offending party. Rule 37(b)(2)(A)(vi). In the opinion of the undersigned, plaintiff has not proven that defendant has engaged in fraudulent actions that could be construed as failing to participate in the discovery process. Further, this matter is set for trial on July 25, 2011. If plaintiff can establish at trial that defendant created a document after the fact to provide justifiable reasons for denying plaintiff Kosher meals that were never actually considered, that should look favorable to a finder of fact and be of great benefit to plaintiff's case. Furthermore, plaintiff can request sanctions from the trial judge.

Accordingly, it is recommended that plaintiff's motion for default and default judgment (Docket #225) and motion for order requiring a response (Docket #237) be denied.

NOTICE TO PARTIES: Objections to this Report and Recommendation must be served on opposing parties and filed with the Clerk of the Court within fourteen (14) days of receipt of this Report and Recommendation. 28 U.S.C. § 636(b)(1)(C); Fed. R. Civ. P. 72(b); W.D. Mich. LCivR 72.3(b). Failure to file timely objections constitutes a waiver of any further right to appeal. *United States v. Walters*, 638 F.2d 947 (6th Cir. 1981). *See also Thomas v. Arn*, 474 U.S. 140 (1985).

/s/ Timothy P. Greeley
TIMOTHY P. GREELEY
UNITED STATES MAGISTRATE JUDGE

Dated: June 24, 2011